IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 24TH SEPTEMBER 2007 / 2ND ASWINA 1929

RSA.No. 678 of 2007()

AS.87/2004 of II ADDL.DISTRICT COURT,ERNAKULAM
OS.775/2000 of PRL.M.C.,ERNAKULAM

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: APPELLANT/APPELLANT/PLAINTIFF

S.N.VAVA, S/O.NEELAKANDAN, AGED
RESIDING AT SASTHAMPARAMBIL, SOUTH PARUR,
MANAKUNNAM VILLAGE, KANAYANNUR TALUK.

BY ADV. SRI.T.B.THANKAPPAN
SMT.ALICE THOMAS

RESPONDENTS: RESPONDENTS/DEFENDANTS

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1. DAVID, S/O.THOMMAN, AGED ABOUT 71,
VALIYAVEETIL, SOUTH PARUR, MANAKUNNAM VILLAGE,
KANAYANNUR TALUK.

2. BENNY, S/O.DAVID, AGED ABOUT 45,
VALIYAVEETIL, SOUTH PARUR, MANAKUNNAM VILLAGE,
KANAYANNUR TALUK.

3. ST.JOHNS CATHOLIC CHURCH, NORTH PARUR,
REPRESENTED BY ITS VICAR AND TRUSTEES VIZ.
I) REV.FR.JOSEPH PALLIPADAN, R/AT PARISH BUNGALOW,
ST.JOHNS CATHOLIC CHURCH, SOUTH PARUR.

II)JOSHY JOHN, TRUSTEE, ST.JOHNS CATHOLIC CHURCH,
RESIDING AT KANAVELI PUTHENPURACKAL, SOUTH PARUR.

. III) JAMES JOSEPH, TRUSTEE
ST.JOHNS CATHOLIC CHURCH, SOUTH PARUR.

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 24/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 678 OF 2007

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Dated this the 24th day of September, 2007

JUDGMENT

Plaintiff in O.S.775/2000 on the file of Munsiff Court, Ernakulam is the appellant. Defendants are the respondents. Appellant instituted the suit seeking a decree for declaration of right of way and mandatory and prohibitory injunction. Case of the appellant was that plaint A schedule property having an extent of 6.375 cents in survey No.17/9 of Manakunnam village originally belonged to third respondent Church and appellant purchased it under Ext.A1 sale deed in 1975 in the name of his sister Sarada to put up a house and third respondent had granted plaint B schedule way having a width of six links commencing from the south western corner of plaint A schedule property to reach the panchayat road on the west. It was contended that since the date of purchase, it is being used as a way and respondents have no

right to cause any obstruction to that way and appellant has been using that way openly, peaceably and uninterruptedly and therefore appellant has a right of easement over the way and respondents are to be restrained from causing any obstruction. Contending that obstruction was caused,a mandatory injunction for removal of the obstruction was sought. Respondent 1 and 2 in the written statement contended that appellant instituted O.S.266/2000 before the same court seeking a decree for injunction. When they did not succeed in getting an interim order the suit was abandoned and was dismissed on 29.2.2000 and hence the subsequent suit is barred under Order XXIII Rule 1(4) of the Code of Civil Procedure. Respondents 3 to 5 in their written statement admitted that Sarada purchased plaint A schedule property under Ext.A1 but plaint B schedule property was not given as a way to the plaint A schedule property and appellant has no right of way over plaint B schedule property and therefore suit is to be dismissed.

2. Learned Munsiff on the evidence of Pws.1 and 2,DW1 and Exts.A1 to A11 dismissed the suit holding that suit is barred under Order XXIII Rule1 (4) of Code of Civil Procedure and appellant did not establish a right of easement by grant or prescription. Appellant challenged the decree and judgment before District Court, Ernakulam in A.S.87/2004. Learned District Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Learned counsel appearing for appellant was heard.

4. The argument of learned counsel is that Ext.A2 letter issued by the Priest of the third respondent Church establish that plaint B schedule property was granted as a way to plaint A schedule property by the Church and though that fact was omitted to be mentioned in Ext.A1 sale deed Ext.A2 establish it and the southern boundary shown in Ext.A4 strengthens the case of the appellant that

he has a right of easement by grant and on the evidence courts below should have granted the decree.

5. On hearing the learned counsel I do not find any substantial question of law involved in the appeal.

6. Though first appellate court set aside the findings of the Munsiff that the suit is barred under Order XXIII Rule 1 (4) of C.P.C, on appreciating the evidence, it was found that appellant did not establish a right of way by easement of grant or prescription. The right of easement claimed in the plaint was not specific. Though ingredients of a right of easement by prescription was pleaded, there was no case in the plaint that he has a right of easement by grant over plaint B schedule property. But what was sought to be proved at the time of evidence is a right of easement by grant. It was Ext.A2 which was relied on to prove the grant. Ext.A2 is a letter allegedly issued by Fr.Jose Mulavarikal of

third respondent Church stating that six links width of way leading from the western road is available to the plaint A schedule property, which is claimed as plaint B schedule property way in the plaint. Courts below on appreciating the evidence found that Ext.A2 was not proved. Though O.S.266/2000 was filed prior to the institution of the suit claiming a right of way, nothing was mentioned about Ext.A2 in that plaint. So also even in the present suit, appellant did not plead that Ext.A2 letter was issued by the Fr.Jose Mulavarikal on behalf of the Church, whereunder a right of grant over the plaint B schedule property is claimed. In such circumstance, first appellate court was justified in finding that If Ext.A2 was in existence, appellant would have pleaded about it in the plaint. Added to this, appellant did not examine the Fr.Jose Mulavarikal who allegedly issued Ext.A2. No other witness was also examined to prove that it was actually issued by Fr.Jose Mulavarikal as claimed by appellant. It is in such

circumstance, courts below found that appellant did not establish right of easement by grant. Though learned counsel relying on the southern boundary of Ext.A4 sale deed where existence of the way is mentioned, argued that it establishes a right of easement by grant, Ext.A4 does not give any indication to establish the existence of a grant. In such circumstance, courts below found that appellant did not establish a right of way by easement of grant.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006